

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LYNETTE DOREEN CARSON,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

Case No. 1:21-cv-00508-EPG
FINAL JUDGMENT AND ORDER
REGARDING PLAINTIFF'S SOCIAL
SECURITY COMPLAINT
(ECF No. 1, 18).

This matter is before the Court on Plaintiff's complaint for judicial review of an unfavorable decision by the Commissioner of the Social Security Administration regarding her application for disability insurance benefits. The parties have consented to entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. § 636(c) with any appeal to the Court of Appeals for the Ninth Circuit. (ECF No. 11).

Plaintiff presents the following issue:
A. The ALJ erred in finding that Plaintiff's cervical spine degenerative disc disease and fibromyalgia were non-severe impairments at Step Two and the resultant RFC fails to include limitations related to that impairment.
(ECF No. 18, p. 1).

Having reviewed the record, administrative transcript, the briefs of the parties, and the applicable law, the Court finds as follows:

1 **I. ANALYSIS**

2 Plaintiff argues that the ALJ erred at Step Two by failing to find Plaintiff's cervical spine
 3 degenerative disease and fibromyalgia to be severe impairments. As a result, Plaintiff argues that
 4 the RFC assessment failed to reflect limitations related to those impairments.

5 If a claimant has a medically determinable impairment (MDI), the ALJ must determine
 6 "whether [the] impairment(s) is severe," which is referred to as Step Two. 20 C.F.R. § 404.1521.
 7 A "severe" impairment is "any impairment or combination of impairments which significantly
 8 limits [a claimant's] physical or mental ability to do basic work activities." 20 C.F.R.
 9 § 404.1520(c). The "ability to do basic work activities," in turn, is defined as "the abilities and
 10 aptitudes necessary to do most jobs." 20 C.F.R. § 404.1522(b).

11 The Ninth Circuit has provided the following guidance regarding whether medically
 12 determinable impairments are severe under Step Two:

13 An impairment or combination of impairments may be found "not severe *only*
 14 *if* the evidence establishes a slight abnormality that has no more than a minimal
 15 effect on an individual's ability to work." [*Smolen v. Chater*, 80 F.3d 1273, 1290
 16 (9th Cir. 1996)] (internal quotation marks omitted) (emphasis added); *see Yuckert*
 17 *v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988). The Commissioner has stated that
 18 "[i]f an adjudicator is unable to determine clearly the effect of an impairment or
 19 combination of impairments on the individual's ability to do basic work activities,
 20 the sequential evaluation should not end with the not severe evaluation step."
 21 S.S.R. No. 85-28 (1985). Step two, then, is a "de minimis screening device [used]
 22 to dispose of groundless claims," *Smolen*, 80 F.3d at 1290, and an ALJ may find
 23 that a claimant lacks a medically severe impairment or combination of
 24 impairments only when his conclusion is "clearly established by medical
 25 evidence." S.S.R. 85-28. Thus, applying our normal standard of review to the
 26 requirements of step two, we must determine whether the ALJ had substantial
 27 evidence to find that the medical evidence clearly established that [Plaintiff] did
 28 not have a medically severe impairment or combination of impairments. *See also*
Yuckert, 841 F.2d at 306 ("Despite the deference usually accorded to the
 Secretary's application of regulations, numerous appellate courts have imposed a
 narrow construction upon the severity regulation applied here.").

Webb v. Barnhart, 433 F.3d 683, 686-87 (9th Cir. 2005). Substantial evidence "is such relevant
 evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 686.

25 A. Cervical Spine Degenerative Disease

26 Here, the ALJ found Plaintiff's lumbar disc degenerative disease to be severe. (A.R. 43).
 27 However, the ALJ concluded that Plaintiff's cervical spine degenerative disc disease was not a
 28

1 severe impairment:

2 After carefully considering the medical evidence of record in its entirety, I find
3 that the claimant's cervical spine degenerative disease. . . [does] not significantly
limit the ability to perform basic work activities and are therefore nonsevere.

4 July 2, 2015 cervical spine x-rays revealed diffuse osteopenia without evidence of
5 fracture or significant subluxation. There was diffuse disc space narrowing at C4-
6 C5-6, and C6-7 with osteophytosis and facet and uncovertebral joint
7 arthropathy. There was no nerve root impingement. (*See Exhibit 8F/32-33*).

8 On March 14 and 17, 2016 examination, she had tenderness of the left
9 cervioscapular, and decreased range of motion with lateral bend to the right.
10 Rotation was normal. (Exhibits 12F/146 and 13F/5). She rarely, if ever, exhibited
11 abnormal cervical spine findings otherwise. (*See Exhibits 1F, 2F, 3F, 4F, 6F, 7F,
8F, 9F, 10F, 11F, 12F, 13F, 14F, and 15F*). Indeed, at the March 22, 2017 State
12 Agency consultative examination, her neck range of motion was within normal
13 limits. (Exhibit 4F/3). As such, I find her cervical spine degenerative changes to be
14 nonsevere.

15 (A.R. 43).

16 Plaintiff contends that the ALJ erred in finding Plaintiff's cervical spine degenerative
17 disease to be non-severe. (ECF No. 18, pp. 18-20). Step Two is a *de minimis* standard to screen
18 out non-meritorious claims. *See Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). Here, the
19 medical evidence does not "clearly establish" Plaintiff's cervical spine degenerative disease as
20 non-severe. *See Webb*, 433 F.3d at 687.

21 The ALJ found Plaintiff's cervical disease to be non-severe because a July 2015 cervical
22 spine X-ray did not evidence any fracture, significant subluxation, or nerve root impingement.
23 (A.R. 43 (citing A.R. 892-3)). However, as Plaintiff points out, this analysis omitted reference to
24 an October 28, 2015 MRI scan that had significant findings that are not consistent with this
25 opinion. (*See ECF No. 18, p. 18 (citing A.R. 1382)*). Specifically, the MRI found "[m]oderate
26 cervical spondylosis with multilevel neural foraminal stenosis, most evident on the left at C6-C7"
27 and "[a]dditional central canal and neural foraminal narrowing." (A.R. 1382). The Commissioner
28 argues that the ALJ's finding is supported by the relative lack of abnormal cervical findings
during Plaintiff's physical examinations (*see A.R. 43 (citing A.R. 326-417, 420-1768)*), as well as
the ALJ's reliance on a March 2017 state consultative medical examination where Plaintiff's
range of motion in her neck was found to be within normal limits (A.R. 43 (citing A.R. 412)).
However, the ALJ's general citation to over a thousand pages of the medical record, including

1 mental health treatment notes and specialist visits for conditions unrelated to Plaintiff's neck pain,
2 does not indicate that the ALJ considered the MRI findings at all. To not discuss this evidence,
3 and base the finding on less probative evidence, was error. *See Webb*, 433 F.3d 683, 688
4 (substantial evidence did not support finding claimant's lower back pain to be non-severe where
5 the record included x-rays showing "disc space narrowing" and a doctor's opinion that claimant
6 may have suffered "degenerative" back conditions and "disc fragmentation or significant
7 herniation").

8 The Court next looks to whether the ALJ's error was harmless. Any error in failing to find
9 an impairment severe at Step Two is harmless where the ALJ considers the limitations posed by
10 the impairment in the step four analysis. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); *see also Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (Where the ALJ ultimately decided
11 step two in the claimant's favor, "she could not possibly have been prejudiced."). Here, it does
12 not appear that the ALJ specifically addressed symptoms related to cervical spine disease when
13 determining Plaintiff's RFC, and the ALJ's earlier determination that the impairment was not
14 severe may have limited the evaluation at this step as well. Accordingly, the Court finds remand
15 warranted to address what, if any, additional limitations should be added to the RFC regarding the
16 cervical degenerative disc impairment, and whether any change to the RFC affects the ALJ's
17 ultimate decision regarding disability.

18 B. Fibromyalgia

19 As discussed above, the ALJ found Plaintiff's lumbar disc degenerative disease to be
20 severe. (A.R. 43). However, the ALJ concluded that Plaintiff's fibromyalgia was not a severe
21 impairment:

22 After carefully considering the medical evidence of record in its entirety, I find
23 that the claimant's . . . fibromyalgia/myofascial pain syndrome . . . [does] not
24 significantly limit the ability to perform basic work activities and are therefore
nonsevere.

25 (A.R. 43).

26 Treating notes show the claimant's providers at Kaiser Permanente diagnosed her
27 with myofascial pain syndrome (fibromyalgia). (*See Exhibit 9F/13*). Fibromyalgia
28 was later included in her past medical history at Camarena Health Centers, (*see Exhibit 6F/17*), and on October 12, 2017, internist Dr. Pushkal Jadaun, M.D., to whom the claimant was referred for a disability evaluation, (*see Exhibit 6F/25*),

1 found that she had tender points all over the body, consistent with fibromyalgia.
 2 (Exhibit 6F/19). Earlier, on March 14, 2016, D. Muhammad Khalid Akbar, M.D.
 3 of Kaiser Permanente found on examination that all four of the claimant's
 4 extremities had mild-to-moderate tenderness present over tender points of
 5 fibromyalgia. (Exhibit 12F/147). On March 10, 2016, then primary care physician
 6 Dr. Maribeth Sian Ruiz, M.D. found that she was positive for trigger points on the
 7 back of her head, base of neck, shoulders, and lower back bilaterally. She was in
 8 no acute distress. (Exhibit 12F/125). Dr. Akbar recorded no tender points on
 9 March 17, 2016 follow-up. (*See Exhibit 13F/5*).
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11 Dr. Jadaun stated that the claimant's fibromyalgia made her back pain worse. (*See*
 12 Exhibit 6F/20). However, treating notes indicate little in the way of targeted
 13 treatment for fibromyalgia. On March 10, 2016, Dr. Ruiz recommended a trial of
 14 tizanidine for fibromyalgia/muscle spasms. (Exhibit 12F/126). However, the
 15 claimant did not take this medication for long. She was started on another muscle
 16 relaxant, Flexeril, and was on it by April 2016, but there was no mention it was
 17 prescribed for fibromyalgia. (*See Exhibit 3F/7*). Little, if any, mention was made
 18 of fibromyalgia thereafter, (*see Exhibits 3F, 6F, 12F, and 13F*), and on October 12,
 19 2017 workup with Dr. Jadaun, referenced in the preceding paragraph, it was listed
 20 among her past medical history, but she was no longer taking Flexeril at that time.
 21 (Exhibits 6F/18). Fibromyalgia is not mentioned in current free clinic notes on
 22 moving to Oklahoma. (*See Exhibits 14F and 15F*).
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24 As such, given the rare findings of tender points, lack of consistent mention in the
 25 longitudinal medical record, and the fact that, as discussed in further detail below,
 26 the claimant has consistently been in no acute distress on examination, I find her
 27 fibromyalgia to be nonsevere.
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(A.R. 44-45).

1 Plaintiff argues that the ALJ's finding that her fibromyalgia was not a severe impairment
 2 is not supported by substantial evidence because the ALJ ignored the criteria for establishing
 3 fibromyalgia as a medically determinable impairment, and thus, Plaintiff's fibromyalgia is severe
 4 because Plaintiff meets these criteria. (ECF No. 18, pp. 20-23). As the Commissioner points out,
 5 Plaintiff conflates the agency guidelines for finding fibromyalgia to be a medically determinable
 6 impairment with the guidelines for finding a claimant's fibromyalgia to be severe after
 7 establishing that the claimant's fibromyalgia meets the criteria as a medically determinable
 8 impairment. *See Soc. Sec. Ruling, Ssr 12-2p; Titles II & Xvi: Evaluation of Fibromyalgia, SSR*
 9 12-2P, 2012 WL 3104869 at * 2-5 (S.S.A. June 25, 2012).

10 Moreover, the ALJ's RFC assessment specifically accounted for Plaintiff's testimony that
 11 she experiences intense reactions to high heat or cold weather due to her fibromyalgia. (*See A.R.*
 12 54; A.R. 64 ("She testified that her pain affects her ability to tolerate extreme heat and cold. The
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1 longitudinal medical records, as discussed above, shows that he has been treated for pain
2 throughout the period under consideration. Albeit, such treatment has been routine and
3 conservative, and she has consistently been in no acute distress on examination. However, I find
4 it reasonable that due to paid, she must avoid even moderate exposure to extreme heat and
5 cold.”). Accordingly, even if the ALJ erred in finding Plaintiff’s fibromyalgia to be non-severe,
6 such error would be harmless because the ALJ considered Plaintiff’s fibromyalgia impairment
7 when formulating the RFC. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (holding that
8 any error in failing to find an impairment severe at Step Two is harmless where the ALJ considers
9 the limitations posed by the impairment in the Step Four analysis).

10 **II. CONCLUSION AND ORDER**

11 Based on the above reasons, the decision of the Commissioner of Social Security is
12 AFFIRMED, in part, and REMANDED, in part. On remand, the ALJ should address what, if any,
13 additional limitations should be added to the RFC regarding Plaintiff’s cervical degenerative disc
14 disease impairment, and whether any change to the RFC affects the ALJ’s ultimate decision
15 regarding disability.

16 IT IS SO ORDERED.

17 Dated: June 27, 2023

18 /s/ *Eric P. Gross*
UNITED STATES MAGISTRATE JUDGE

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